

Received 12/17/2020

**TO:** Jennifer Dodd, Director, Division of Water Resources at the Tennessee Department of Environment and Conservation (TDEC)

**FROM:** **Ex. 6 Personal Privacy (PP)**

**DATE:** Dec. 17, 2020

**RE:** Appeal of Aquatic Resource Alteration Permit NRS 20.089

### Introduction

Pursuant to T.C.A. § 69-3-105(i) and Rule 0400-40-03-.12, this document is intended as an appeal to the approval of the Byhalia Oil Pipeline Project Aquatic Resource Alteration Permit NRS 20.089. Many residents and local organizations oppose this project and submitted comments asking for this permit to be denied on multiple grounds. Unfortunately, TDEC disregarded risks to the community and environment in granting the permit. In making its decision on the permit TDEC also ignored evidence of racial discrimination, the disparate impacts of historic environmental pollution on the community, the cumulative impacts of additional risks of environmental pollution, the risks of potential failure of the pipeline and ensuing environmental damage, and the impacts of additional oil combustion to the climate.

Appellants and the Boxtown community strongly believe that this permit should be denied and the pipeline project as a whole be withdrawn as the threat of the pipeline construction (and risks of failure) to water, habitat, and human health outweigh any economic gains that would be received by the City of Memphis and Shelby County. Furthermore, TDEC should not force community members to bear any further environmental and health risks so that large companies and their shareholders may benefit economically.

### Timeliness and Request for Agency Discretion

This appeal is timely pursuant to TCA 69-3-105(i) as formal notice was issued by the Division of Water Resources on December 04, 2020.<sup>1</sup>

Appellants are community members who live in and around Boxtown in Memphis, TN, a community that has been cumulatively and disparately impacted by nearby sources of pollution for many decades.

Appellants ability to review the permit documents and prepare filings has been significantly impacted by the COVID-19 emergency. Appellants request maximum agency deference under order “BOE - G - 02 - BOE Operations During COVID-19 Situation - 032620”.<sup>2</sup>

### Declaration of Participation in the Public Comment Period

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<sup>1</sup> “Notice of Individual Permit Decisions”, Department of Water Resources Natural Resources Unit (Dec. 04, 2020) (containing permit issuance NRS20.089 to Byhalia Pipeline LLC), available at: [https://www.tn.gov/content/dam/tn/environment/water/water-public-notices/ppo\\_water\\_2020-12-04-arap-nod.pdf](https://www.tn.gov/content/dam/tn/environment/water/water-public-notices/ppo_water_2020-12-04-arap-nod.pdf)

<sup>2</sup> “BOE - G - 02 - BOE Operations During COVID-19 Situation - 032620”, (March 26, 2020) Available at: [https://www.tn.gov/content/dam/tn/environment/documents/covid19\\_guidancefor-boe-operations.pdf](https://www.tn.gov/content/dam/tn/environment/documents/covid19_guidancefor-boe-operations.pdf)

Appellants participated in the public comment period as required by Tenn. Comp. R. & Regs. 0400-40-07-.04(9)(c).

### **Inadequate Consideration of Civil Rights Concerns and Legal Obligations**

TDEC inadequately addressed the concerns about environmental justice raised in public comments to the draft permit and mischaracterized its legal responsibilities under the U.S. Constitution and Federal Law to protect civil rights of Tennessee residents.

The 14th Amendment of the US Constitution prohibits states from preventing residents within their jurisdictions from receiving equal protection under the law. Title VI of the Civil Rights Act prohibits recipients of federal financial assistance, such as Tennessee, from discriminating based on race, color, or national origin in any program or activity. Although also important, these binding obligations are not wholly contained within the goals Executive Order 12898. Environmental justice and civil rights protections are not limited to meaningful involvement. Instead, the framework of rights provides for communities to be protected from substantive government policy or action that is discriminatory in intent or effect. Furthermore, the Tennessee Civil Rights Act and Disability Act<sup>3</sup> imposes substantive duties on agents of state government to protect civil and human rights. Regardless of whether “Tennessee [has] an EO or specific language within rule or statute that requires and/or provides TDEC the explicit authority to consider environmental justice within its environmental regulatory program actions” (Notice at 9), the law imposes duties upon TDEC to protect Tennessee residents from violations of their civil rights.

The district where this pipeline is being proposed is over 90% Black and African American.<sup>4</sup> The median household incomes in the area are 25% lower than those on average in Memphis.<sup>5</sup> This is a community that has tragically been chosen to take advantage of some of the most vulnerable people in our community. According to a 2013 study in *Atmospheric Environment*, the cumulative cancer risk from toxic air in Southwest Memphis, which includes Boxtown is approximately four times higher than the national average and driven by industrial and transportation-related pollutants like benzene and formaldehyde.<sup>6</sup> Although nearly half of the residents in Boxtown’s census tract have an annual household income below \$25,000 a year, 61% are homeowners – well above the most recent average national Black homeownership rate of 47%, which lags behind that of white homeowners, at 76%, due to a history of racist housing policies.<sup>7</sup> The digital divide is also a barrier as no more than 30% of the residents currently have access to broadband.<sup>8</sup> The compounding injustices already faced by this community would be exacerbated by Plains All American’s pipeline.

Specifically, residents in Memphis’ 38109 are 99% black, with an annual household income of \$18,000.<sup>9</sup> This is an area that is comprised of low-income, marginalized people. Studies have shown that Hispanics, Asians, American Indians/Alaska Natives and especially African Americans have experienced higher levels of harm, including premature death from exposure to air pollution. According to census data, residents in zip code 38109 are exposed to arguably the worse air quality in the country. The annual Air Quality Index for the Memphis (zip 38109) area is 38 (100=best). The US average is 58.

<sup>3</sup> Tenn. Code Ann. § 4-21 (2016)

<sup>4</sup> <https://data.census.gov/cedsci/table?g=86000000US38109&tid=ACSST5Y2018.S1101&hidePreview=false>

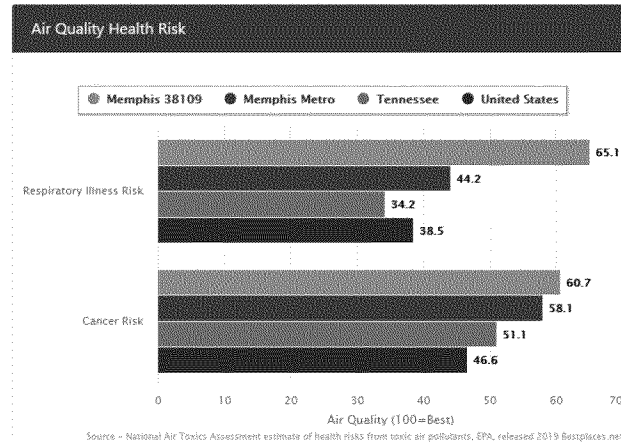
<sup>5</sup> <https://www.incomebyzipcode.com/tennessee/38109>

<sup>6</sup> <https://doi.org/10.1016/j.atmosenv.2013.09.006>

<sup>7</sup> <https://www.census.gov/housing/hvs/files/currenthvspress.pdf>

<sup>8</sup> [https://www.brookings.edu/research/signs-of-digital-distress-mapping-broadband-availability/?fbclid=IwAR22MbkSD3s0PQZGwbJVPgkoYzjkl16SDj2mMWbD0kF\\_Xe6rpBWZTvtJffw#caned](https://www.brookings.edu/research/signs-of-digital-distress-mapping-broadband-availability/?fbclid=IwAR22MbkSD3s0PQZGwbJVPgkoYzjkl16SDj2mMWbD0kF_Xe6rpBWZTvtJffw#caned)

In relation to air quality health risks, citizens in this area are more likely than residents residing in the Memphis Metropolitan area, the state of Tennessee, and individuals dwelling in the United States to develop respiratory illness and certain cancers. See below chart



Source: US Census [www.bestplaces.net/health/zip-code/tennessee/memphis/38109](http://www.bestplaces.net/health/zip-code/tennessee/memphis/38109)

Residents in Memphis 38109 also have higher rates of cancer when compared to other zip codes in the city. See below resource from Shelby County Health Department.

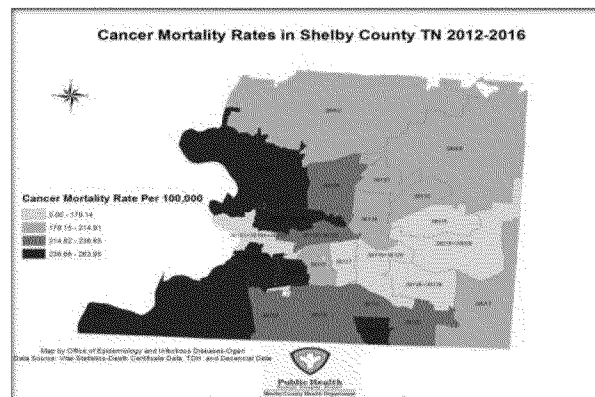


Figure 70 Cancer Mortality Rates by ZIP Code, Shelby County, 2012-2016

Land agents for the pipeline project were overheard in public describing the Boxtown community as “the path of least resistance” for the pipeline. This statement was confirmed by Plains All American pipeline representative Katie Martin when she apologized for it in a community meeting.<sup>10</sup> With knowledge of the racial makeup and history of environmental injustice in Boxtown, any reasonable person would consider this statement to be indicative of intentional discrimination if not explicit racial animus. Certainly, Boxtown residents who heard about this statement considered it to be discriminatory. There is no evidence in the permit that TDEC investigated this incident, considered the potential for racial

<sup>10</sup> See “Is Boxtown the “path of least resistance” for the Byhalia Connection Pipeline route?”, Memphis Aquifer (Nov. 1, 2020), available at: <https://www.youtube.com/watch?v=0S0GtafyVIM>

discrimination in its assessment, or took it seriously at all. TDEC's failure to investigate or consider incidents of explicit racial discrimination brought to its attention is unlawful.

Furthermore, despite being made aware of information about disparate impacts of environmental pollution and health outcomes, TDEC failed to adequately consider the environmental burden on the Boxtown community in its permit review.

By failing to consider the disparate impact of this permit's approval, the communities rights and needs were not thoughtfully considered. The Boxtown community and community of Southwest Memphis has been over-burdened by environmental injustice. This impact has been in the water, in the air, and in the land where they have made their lives over the decades.

It is not adequate or lawful for agents of a state to ignore evidence of racial discrimination or disparate environmental impacts. The permit decision should be invalidated and returned to TDEC to adequately consider issues of racial discrimination, disparate impacts to the Boxtown community and other historically marginalized residents, and other potential cumulative environmental, social, and public health impacts of this pipeline project.

### **Inadequate Public Process**

Considering issues associated with COVID 19 and widespread community interest in and opposition to this project, TDEC should have provided more opportunity for public comment and involvement in this process. This is especially true given that the affected community is a historically marginalized community with majority black residents and historical exposure to nearby environmental pollution that has negatively affected health outcomes at a population level.

### **Inadequate Analysis of Proposed Routes**

#### *No Action Alternative*

The Division of Water Resources failed to consider the No Action Alternative, concluding that "[t]he no action alternative does not meet the project's overall purpose of providing a connection between these two pipelines and was not further considered." Simply stating the obvious fact that failing to build a pipeline connection will not result in a pipeline connection is inadequate under the law.

TDEC should analyze the No Action Alternative and explicitly address community interests, evidence about the historic environmental burden borne by the communities in the proposed pipeline route, the potential for pipeline ruptures and accidents, the importance of preventing risk to groundwater and aquifers, and other environmental, social, and public health concerns raised by community members in the public comments.

#### *Alternative 5 - Preferred Alternative*

The selected route, Alternative 5, states that there are no significant adverse environmental consequences, yet,

- Alternative 1 is impractical because it crosses residential areas which will raise safety concerns; however, the pipeline will cross neighborhoods through Chickamauga Avenue and Mossville. The concern of neighborhood crossings does not appear to be consistent because Alternative 5 also will be in a residential area.

- The route crosses McKellar Lake which was listed as a difficult path and was mentioned as unfeasible for Alternative 2. The project should also not be feasible for Alternative 5 as the pipeline would still cross the lake.
- Alternative 3 is stated to be near the Chucalissa Archaeological Park, and because it is close to cultural resources was not chosen, yet Chickamauga Avenue (the pipeline will be constructed in this area) is only 3.3 miles away from the same park. From Skylark Drive, also a local road in which the pipeline will be constructed outside of, is only 2.2 miles from the park. There is no location in southwest Memphis that is not significantly close to the cultural site until you reach Mitchell Road and go west which is not the chosen route of the pipeline.

The clear inconsistency in TDEC's reasoning that Alternative 5 be selected as the Preferred Alternative necessitates remand of the permit and reconsideration.

### **Failure to Establish Reasonable Assurance That the Activity Will Not Violate Provisions of the Tennessee Water Quality Control Act and the Clean Water Act**

The Division was required to establish reasonable assurance that the proposed activities would not violate provisions of the Tennessee Water Quality Control Act, or provisions of §§ 301, 302, 303, 306, or 307 of the federal Clean Water Act. 33 U.S.C. § 1341. The Notice of Determination and Permit fail to include any analysis of why the Division is reasonably assured that these provisions will not be violated, including but not limited to the lack of analysis described below. As such, there is insufficient evidence to support this conclusion.

### **Failure to Assess Whether the Proposed Activities Violate the Public Trust Doctrine**

The Tennessee Water Quality Control Act declares that "waters of Tennessee are the property of the state and are held in public trust for the use of the people of the state" and that "the government of Tennessee has an obligation to take all prudent steps to secure, protect, and preserve this right." T.C.A. § 69-3-102(a). This provision codifies the public trust doctrine, which provides that the state serves as a trustee over certain resources (in this case, waters of the state) owned by the public and that the state therefore has a duty to protect and hold these resources in trust for public use and enjoyment.

In evaluating a permit, the Division is *required* to consider, among other factors, "any other factors relevant under the Act." Tenn. Comp. R. & Regs. 0400-40-07.04(6)(c). By failing to consider whether the Division's approval of the proposed project breached its duties under the public trust doctrine, it failed to meet its obligations under the TWQCA. As such, the permit should be remanded for reconsideration of whether it satisfies the state's obligations under the public trust doctrine.

### **Failure to Adequately Assess Project's Compliance with Tennessee Antidegradation Statement**

In assessing an application for an Aquatic Resource Alteration Permit, the Division of Water Resources is required to ensure compliance with the Tennessee Antidegradation Statement. Tenn. Comp. R. & Regs. 0400-40-03-.06. This Statement requires that, "[w]here the quality of Tennessee waters is better than the level necessary to support propagation of fish, shellfish, and wildlife, or recreation in and on the water," the Division must make a finding "that lowering water quality is necessary to accommodate important economic or social development in the area in which the waters are located as established herein" in order to permit any activities degrading that water quality. Tenn. Comp. R. & Regs. 0400-40-03-.06(1)(a). The Division avoided this assessment by concluding that the proposed activities would only result in *de minimis* degradation "because the applicant proposes to provide in-system mitigation to offset any appreciable permanent loss of resource values." Habitat alterations can be classified as *de minimis* if "the

Division finds that the impacts, individually and cumulatively are offset by impact minimization and/or in-system mitigation.” Tenn. Comp. R. & Regs. 0400-40-03-.04(4)(b). Additionally, the Division’s Rules require that the draft permit include a rationale explaining “the basis for determining that the mitigation is sufficient to result in no overall net loss of resource values from existing conditions.”

The entirety of the Division’s findings to this end are as follows: “The Division has determined that the proposed activities will result in *de minimis* degradation because the applicant proposes to provide in-system mitigation to offset any appreciable permanent loss of resource values.” In simply stating that the applicant proposes in-system mitigation without any further findings, the Division failed to adequately assess whether that mitigation sufficiently offset both the individual and cumulative impacts of the proposed degradation. In failing to do so, the Division improperly avoided consideration of whether the project was socially and economically justified.

### **Failure to Adequately Consider Impacts to Memphis Sand Aquifer**

The proposed project overlays the Memphis Sand Aquifer, an important source of drinking water for over a million residents of Memphis and Shelby County and a source of water for industry and agricultural uses. The Division was required to assess the potential impact of the proposed project on the Aquifer as a water resource and water of the state. The Tennessee Water Quality Control Act requires an Aquatic Resource Alteration Permit for “any activity which results in the alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state, including wetlands.” T.C.A. § 69-3-108(b)(1). TWQA defines “waters” as “any and all water, public or private, on or beneath the surface of the ground, that are contained within, flow through, or border upon Tennessee or any portion thereof.” T.C.A. § 69-3-103(45). In evaluating a permit, the Division is *required* to consider, among other factors, “whether the proposed activity is reasonably likely to have cumulative or secondary impacts to the water resource”; “hydrologic modifications resulting from the proposed activity”; and “any other factors relevant under the Act.” Tenn. Comp. R. & Regs. 0400-40-07.04(6)(c). Without any analysis of the proposed project itself or its relationship to the Memphis Sand Aquifer, the Division made the conclusory determination that “[u]tility line construction does not have the potential to affect this regional water table.” Notice at 6. The Division was required to assess the impacts of the *proposed project*, not utility line construction in general, on waters of the state. Further, the Division relies on an outdated 1995 study of the Cockfield and Cook formations, assuming that distance above the formations is the only relevant risk factor. The Division did not account for variations in thickness of the clay protective layer or the pipeline’s interaction with the aquifer’s recharge area.<sup>11</sup> In fact, a 2019 study identified sixteen breaches in the Memphis Sand Aquifer’s clay protective layer and noted that there are likely more.<sup>12</sup> Shallow environmental contamination has been documented reaching the Aquifer in multiple instances and the Division failed to satisfy its obligations under the TWQCA and CWA by ignoring this risk.<sup>13</sup> The

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<https://static1.squarespace.com/static/5b7b3e99d274cb770c84b404/t/5f99a064e31e852dd5ed88f8/1603903588408/POA+Comments+on+ARAP+to+TDEC.pdf>; “Risk of Contamination of the Memphis Sand Aquifer, Allen Fossil and Combined-Cycle Combustion Turbine Plants: Review and Analysis of the Environmental Investigation Plan, Remedial Investigation, and Interim Remedial Action.” Douglas J. Cosler. November 26, 2018.

<sup>12</sup> <https://www.commercialappeal.com/story/news/2019/04/08/memphis-sand-aquifer-contamination-drinking-water-safety-study/3401419002/>

<sup>13</sup>

<https://static1.squarespace.com/static/5b7b3e99d274cb770c84b404/t/5f99a0dfb7b7433c4b54f4e0/1603903744605/POA+Comments+to+TDEC+Byhalia+Connection.pdf>

Division was required under the TWQCA to substantively assess these risks to the Memphis Sand Aquifer and associated water resources and failed to meaningfully do so, invalidating the issued permit.

### **Failure to Consider the Risks of Pipeline Accidents and Ruptures**

TDEC did not consider all factors necessary “to prevent future pollution of state waters and to plan for future use of such waters so that the water resources of Tennessee might be used and enjoyed to the fullest extent consistent with the maintenance of unpolluted waters.” Tenn. Comp. R. & Regs 0400-40-07-.01(1). Instead, TDEC disclaimed all responsibility for preventing future pollution of state waters and placed the responsibility on the Pipeline and Hazardous Materials Safety Administration. Notice at 5.

Considering that there are nearly 300 documented leaks, ruptures, breaks, explosions, and accidents from pipelines per year,<sup>14</sup> the failure to consider the full risks of the Byhalia pipeline to Tennessee’s waters is not only contrary to law, but recklessly indifferent to the health of the environment and Tennessee’s residents.

### **Impacts to Aquatic and Terrestrial Species**

#### **Riparian Vegetation at Horn Lake Creek, Cypress Creek**

Both creeks and its contents will be affected by the move to Ensley Bottoms significantly because of *riparian vegetation*. Furthermore, impacts from land disturbing activities and the removal of riparian vegetation adds sediment to streams. This makes it difficult for animals to see food, clogs fish gills, reduces resistance to disease and affects fish egg and larvae development. Simply put, this land disturbing activity greatly increases pollution to this area and would adversely affect this community tremendously.

The permit document mentions that any adjustments/changes to the habitat would be temporary and not significant. Science does not support this statement. Although degradation of native riparian plant communities by forestry, agriculture and grazing can often be reversed, other practices such as drainage modifications and structural developments in urban areas generally lead to irreversible changes in riparian areas over long time periods (The Natural Academics of Sciences, Engineering, Medicine and Human Alteration of Riparian Areas). Science indicates that this move will have long term ramifications and consequences. TDEC should not allow this to happen. These streams will never be able to fully recover to its natural abilities if the essence of its contents will be torn and ravaged by machinery.

One result of human disturbance is that as flow regimes and sediment supply are altered, flood plains often become hydrologically disconnected from their channels through channel narrowing or flood plain aggradation. As flood plains and channels are decoupled, riparian plant performance declines, reducing many riparian species competitive abilities (Riparian Vegetation Response to Altered Disturbance and Stress Regimes, Shafroth, Stromberg & Patten). By moving the species, TDEC is also acknowledging that there will be species that will not survive. Plains All American know pipelines, they have no regard for nature and the items that have been placed by God in this community. TDEC must protect this land at all costs.

### **Conclusion**

As demonstrated above, TDEC’s analyses were inadequate, its conclusions were not supported by the evidence, and the permit was granted contrary to law. Furthermore, TDEC failed to demonstrate the need of the project in order to avoid conducting a proper assessment of the significant potential social,

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<sup>14</sup> [https://www.biologicaldiversity.org/campaigns/americas\\_dangerous\\_pipelines/](https://www.biologicaldiversity.org/campaigns/americas_dangerous_pipelines/)

environmental, and economic harms of the project. As such, permit NRS 20.089 should be invalidated and returned to TDEC for a proper analysis of the potential harms of this proposed project to waterways and human health. Ultimately, TDEC should deny this and any other state permits for the Byhalia Pipeline project because the potential harms to human and environmental health outweigh any potential benefit for the residents of Tennessee.

Thank you for your consideration,

**Ex. 6 Personal Privacy (PP)**